Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	
	)	

REPORT AND ORDER

Adopted: February 6, 1997 **Released:** February 7, 1997

By the Commission:

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I. INTRODUCTION

1. In this Report and Order, part of the Commission's implementation of the Telecommunications Act of 1996,[1] we adopt rules implementing new section 259 of the Communications Act of 1934, as amended.[2] Section 259 generally requires an incumbent local exchange carrier (incumbent LEC)[3] to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to "qualifying carriers" that are eligible to receive federal universal service support but that lack economies of scale or scope.[4] In contrast to sections 251 and 252, which grant rights to requesting carriers irrespective of whether the requesting carrier intends to compete with the incumbent LEC, section 259 does not permit "qualifying carriers" to use an incumbent LEC's public switched network infrastructure, technology, information, and telecommunications facilities and functions obtained pursuant to section 259 to offer services or access to the incumbent LEC's customers in competition with the incumbent LEC. Section 259(a) directs the Commission to prescribe regulations that implement this requirement within one year after the date of enactment of the

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

[2] The Communications Act of 1934, as amended, 47 U.S.C. §§ 259, *et seq.* (1934 Act or Act).

[3] Section 251(h) of the Communications Act defines incumbent local exchange carriers as follows:

> (1) DEFINITION -For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that -
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h).

[4] 47 U.S.C. § 259. *See also* 47 U.S.C. § 214(e).

1996 Act, *i.e.*, by February 8, 1997.[5] Pursuant to the *Notice of Proposed Rulemaking* that initiated this proceeding,[6] we have elected, overall, to articulate general rules and guidelines to implement section 259.[7]

2. With the 1996 Act, Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technology to all Americans . . . ."[8] This rulemaking implements section 259 in a manner that ensures that carriers that are eligible to receive universal service support but lack economies of scale or scope can provide advanced telecommunications and information services in the most efficient manner possible by taking advantage of economies of scale and scope possessed by incumbent LECs. At the same time, we ensure that the results of this implementation of section 259 will not serve to prevent competitive entry into any telecommunications market.

II. BACKGROUND

3. In the 1996 Act, Congress moved to restructure the local telecommunications market so as to remove legal, regulatory, and economic impediments to market entry that exist in a monopoly environment. One aspect of this restructuring requires incumbent LECs to offer to requesting telecommunications carriers interconnection, unbundled network elements, and telecommunications services at wholesale rates for resale.[9] At the same time, Congress acted to ensure that access to the evolving, advanced telecommunications infrastructure would be made

[5] 47 U.S.C. § 259(a).

[6] *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996,* Notice of Proposed Rulemaking, CC Docket 96-237, FCC 96-456 (rel. Nov. 22, 1996) (NPRM).

[7] Twenty parties filed comments in this proceeding and fourteen of these parties filed reply comments. Two additional parties filed comments to the Commission which were subsequently transferred to the universal service proceeding in CC Docket 96-45. The parties, along with the shorthand forms of identification used in this Report and Order, are listed in Appendix A.

[8] S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. (1996) (Joint Explanatory Statement).

[9] 47 U.S.C. § 251(b)(5), (c)(2), (c)(3), (c)(4). We note that section 251(b)(5) applies to all LECs, including incumbent LECs, while §§ 251(c)(2), (c)(3) and (c)(4) apply only to incumbent LECs. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45476 (rel. Aug. 8, 1996) (*Local Competition First Report and Order*). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., Oct. 15, 1996).

broadly available in all regions of the nation at just, reasonable, and affordable rates.[10] Consistent with these two major goals, Congress enacted Section 254, which, *inter alia*, directs the Commission to preserve and advance universal service by defining services that will receive universal service support, establish specific, predictable, sufficient, and explicit mechanisms to provide that support to eligible carriers, and ensure that quality services are available at just, reasonable, and affordable rates. Section 259 complements section 254 by requiring incumbent LECs to make available, under certain conditions, public switched network infrastructure and other capabilities to qualifying carriers that are providing universal service outside the providing incumbent LEC's telephone exchange area.[11]

A. Overview of Section 259

4. Section 259(a) directs the Commission, within one year after the date of enactment of the 1996 Act, to prescribe regulations that require incumbent LECs to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier in the service area in which the qualifying carrier has requested and obtained designation as an eligible carrier under section 214(e).[12] An incumbent LEC cannot, however, be required to take any actions that are economically unreasonable or contrary to the public interest.[13] Incumbent LECs are also not required to make available "services or access" that would be provided by the qualifying carrier to consumers in the incumbent LECs "telephone exchange area."[14] The Commission may permit,

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[10] 47 U.S.C. § 254(b). *See Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93 (rel. Mar. 8, 1996) ("*Universal Service NPRM*"); *see also Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (rel. Nov. 8, 1996) (*Joint Board Recommendation on Universal Service*).

[11] 47 U.S.C. § 259(a), (b)(6).

[12] Section 214(e) delineates the conditions under which a telecommunications carrier qualifies as an "eligible telecommunications carrier" for purposes of receiving universal service support. Section 214(e)(1) further provides that, throughout the service area for which it has received such designation, an eligible telecommunications carrier shall:

> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> (B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1).

[13] 47 U.S.C. § 259(b)(1).

[14] 47 U.S.C. § 259(b)(6).

but shall not require, joint ownership or operation of public switched network infrastructure and services,[15] and must ensure that incumbent LECs are not treated as common carriers by virtue of meeting their section 259 obligations.[16] Section 259(b) further directs the Commission to establish guidelines implementing infrastructure sharing pursuant to just and reasonable terms and conditions that permit the qualifying carrier to "fully benefit" from the economies of scale and scope of the incumbent LEC.[17] The Commission must establish conditions to promote cooperation between incumbent LECs and qualifying carriers.[18] The Commission must also require the incumbent LEC to file with the Commission or state "any tariffs, contracts, or other arrangements that show rates, terms, and conditions" under which the incumbent LEC is making available "public switched network infrastructure and functions" pursuant to section 259.[19]

5. Section 259(c) requires incumbent LECs that have entered into infrastructure sharing agreements to "provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment."[20] Section 259(d) defines a "qualifying carrier" as a telecommunications carrier that:

> (1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and
> (2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e).[21]

Section 214(e) provides that a common carrier designated as an eligible telecommunications carrier shall be eligible to receive universal service support and shall, throughout the service area for which designation is received, offer services that are supported by federal universal service support mechanisms promulgated under section 254(c),[22] either by using its own facilities or a

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[15] 47 U.S.C. § 259(b)(2).

[16] 47 U.S.C. § 259(b)(3).

[17] 47 U.S.C. § 259(b)(4).

[18] 47 U.S.C. § 259(b)(5).

[19] 47 U.S.C. § 259(b)(7).

[20] 47 U.S.C. § 259(c).

[21] 47 U.S.C. § 259(d)(1)-(2).

[22] 47 U.S.C. § 254(c).

combination of its own facilities and resale of another carrier's services. Section 214(e) also states how eligible telecommunications carriers shall be designated.[23]

B. Summary of Decision

6. We determine that section 259 is complementary to the other sections of the 1996 Act and is a "limited and discrete" provision designed to promote universal service in areas that in many cases, at least initially, will be without competitive service providers, but without restricting the development of competition.[24] Essential differences in the language of sections 259 and 251 make clear that these provisions address fundamentally different situations. First, in accord with section 259(b)(6), section 259 applies only in instances where the qualifying carrier does not seek to use shared infrastructure to offer certain services within the incumbent LEC's telephone exchange area, whereas section 251 applies irrespective of whether new entrants seek to provide local exchange or exchange access service within the incumbent's telephone exchange area.[25] Second, section 259(a) establishes specific limitations on a qualifying carrier's use of an incumbent LEC's infrastructure, *i.e.*, a qualifying carrier may use section 259 only "*for the purpose* of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e)."[26] Third, section 259, in contrast to section 251, limits the telecommunications carriers that may obtain access to an incumbent LEC's network by the inclusion of qualifying criteria in subsection 259(d).[27]

7. Thus, we conclude that while section 251 applies to all carriers in all situations -- including, but not limited to, new entrants competing with the incumbent LEC -- section 259 only applies in narrow circumstances, *i.e.*, for the benefit of those carriers that are eligible to receive universal service support but lack economies of scale or scope and only to the extent that the qualifying carriers do not use section 259-obtained infrastructure to compete with the providing incumbent LEC. We conclude that a qualifying carrier that obtains, pursuant to section 259 arrangements, interconnection, unbundled network elements, and other telecommunications functionalities otherwise available pursuant to section 251, does not lose its section 251-derived obligation to provide interconnection to competitive LECs. We also find that section 259 arrangements can include additional functionalities that may be provided to qualifying carriers uniquely pursuant to section 259. Making clear that we will enforce the section 251-derived

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[23] 47 U.S.C. § 214(e).

[24] *See Local Competition First Report and Order* at ¶ 165 (footnote omitted).

[25] 47 U.S.C. § 259(b)(6). *See also* Discussion at Section III. C. 6., *infra.*

[26] 47 U.S.C. § 259(a) (emphasis added). *See also* Discussion at Section III. A. 1., *infra.*

[27] 47 U.S.C. § 259(d). *See also* Discussion at Section III. E., *infra.*

interconnection rights of competitive LECs, however, will help ensure that competitive entry into markets served by qualifying carriers markets is not hampered by the operation of otherwise valid section 259 arrangements. Moreover, we further promote competitive entry by finding that qualifying carriers may include *any* carrier that satisfies the requirements of section 259(d) -- in other words, not just incumbent LECs, but competitive LECs and any other carrier that satisfies section 259(d) requirements.

8. In this Report and Order, we choose to implement section 259 by adopting rules that recognize the central role played by private negotiations in promoting the ability of qualifying carriers to obtain access to "public switched network infrastructure, technology, information, and telecommunications facilities and functions" provided by other carriers. A negotiation-driven approach is appropriate because, *inter alia*, section 259, unlike section 251, contemplates situations where the requesting carrier is not using the incumbent LEC's facilities or functions to compete in the incumbent LEC's telephone exchange area. In such circumstances, we believe that the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage. Thus, wherever possible we adopt specific rules that restate the statutory language. The approach we adopt, which relies in large part on private negotiations among parties to satisfy their unique requirements in each case, will help ensure that certain carriers who agree to fulfill universal service obligations pursuant to section 214(e) can implement evolving levels of technology to continue to fulfill those obligations. Again, because we also affirm the rights of competitive LECs to secure interconnection pursuant to section 251 our approach to implementing section 259 does not discourage the development of competition in any local market.

9. Regarding the scope of section 259(a), we allow the parties to section 259 agreements to negotiate what "public switched network infrastructure, technology, information, and telecommunications facilities and functions" will be made available, without *per se* exclusions. We also decide that, whenever it is the *only means* to gain access to facilities or functions subject to sharing requirements, section 259(a) requires the providing incumbent LEC to seek to obtain and to provide necessary licensing of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment, subject to the reimbursement for or the payment of reasonable royalties. We decide that it shall be the responsibility of the providing incumbent LEC to find a way to negotiate and implement section 259 agreements that do not unnecessarily burden qualifying carriers with licensing requirements. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC must secure such licensing by negotiating with the relevant third party directly.

10. Regarding the implementation of section 259, we conclude that section 259(a) grants the Commission authority to promulgate rules concerning any section 259 agreement to share public switched network infrastructure, technology, information, and telecommunications facilities and functions, regardless of whether they are used to provide interstate or intrastate services. At the same time, we make clear that nothing in our analysis of section 259 indicates

an intent to regulate intrastate services, as opposed to regulating agreements regarding the sharing of infrastructure. We also note that section 259 dictates two discrete roles for the states with respect to section 259: states may accept for public inspection the filings of section 259 agreements that are required by section 259(b)(7); and states must designate a carrier as an "eligible telecommunications carrier" pursuant to section 214(e)(2)-(3). We further conclude that it is unnecessary to adopt any particular rules to govern disputes between parties to section 259 agreements that may be brought before the Commission. Finally, we decide that it would be inappropriate to further construe the requirements of section 259(d)(2) in this proceeding because issues materially relating to section 259(d)(2) will be decided by the Commission in the universal service proceeding scheduled to be concluded by May 8, 1997.

11. We require that providing incumbent LECs may recover their costs associated with infrastructure sharing arrangements, and we conclude that incentives already exist to encourage providing and qualifying carriers to reach negotiated agreements that do so (section 259(b)(1)). We decide that no incumbent LEC should be required to develop, purchase, or install network infrastructure, technology, and telecommunications facilities and functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired, and does not intend to build or acquire, such elements. We also decide that a providing incumbent LEC may withdraw from a section 259 infrastructure sharing agreement upon an appropriate showing to the Commission that the arrangement has become economically unreasonable or is otherwise not in the public interest.

12. We permit but do not require providing incumbent LECs and qualifying carriers to develop through negotiation terms and conditions for joint ownership or operation of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" (section 259(b)(2)). We decide that joint owners will be treated as providing incumbent LECs for purposes of section 259 regulations. We also decide that it is not necessary for the Commission to consider, at this time, the accounting and jurisdictional separations implications of joint ownership arrangements pursuant to section 259.

13. We conclude that infrastructure sharing does not subject providing incumbent LECs to common carrier obligations, including a nondiscrimination requirement, because such a result would be contrary to the clear mandate of section 259(b)(3). In the NPRM we asked whether an "implied nondiscrimination requirement" should be inferred based on the "just and reasonable" requirement included in Section 259(b)(4). We conclude that Section 259(b)(4) includes no nondiscrimination requirement, but we also conclude that the "just and reasonable" requirement will serve to ensure that all qualifying carriers receive the benefits of section 259. We reaffirm that, to the extent that requesting carriers seek access to elements pursuant to section 251, sections 201 and 251 expressly require rates set pursuant to those provisions not only to be just and reasonable, but also non-discriminatory or not unreasonably discriminatory.[28]

[28] 47 U.S.C. §§ 201 (not unreasonably discriminatory), 251 (nondiscriminatory).

14. We decide that, although the Commission may have pricing authority to prescribe guidelines to ensure that qualifying carriers "fully benefit from the economies of scale and scope of [the providing incumbent LEC]," it is not necessary at this time to exercise this authority (section 259(b)(4)). We anticipate that, in this negotiation-driven approach, qualifying carriers and providing incumbent LECs will face economic incentives that will allow them to reach mutually satisfactory terms for infrastructure sharing. In particular, we note that, because section 259 contemplates situations where requesting carriers are not using the incumbent LEC's facilities or functions to compete in the incumbent LEC's telephone exchange area, the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage vis-a-vis a non-competing qualifying LEC. We further decide that availability, timeliness, functionality, suitability, and other operational aspects of infrastructure sharing also are relevant to determining whether the qualifying carrier receives the benefits mandated by section 259(b)(4). We conclude that the negotiation process, along with the available dispute resolution, arbitration, and complaint processes available from the Commission, will ensure that qualifying carriers fully benefit from the economies of scale and scope of providing incumbent LECs. We note that non-qualifying competitive LECs may avail themselves of these same processes to prevent unlawful anticompetitive outcomes resulting from section 259-negotiated arrangements. Further, we note that any anticompetitive outcomes may be proscribed by operation of the antitrust laws from which Congress has granted no exemption to parties negotiating section 259 agreements. We further note that the Commission has ample authority pursuant to Title II to set aside any intercarrier agreements found to be contrary to the public interest.

15. We conclude that it is unnecessary at this time for the Commission to establish detailed national rules to promote cooperation (section 259(b)(5)). We conclude that, because there is a requirement that infrastructure sharing arrangements not be used to compete with the providing incumbent LEC, and because a providing incumbent LEC is permitted to recover its costs incurred in providing shared infrastructure pursuant to section 259, sufficient incentives exist to encourage lawful cooperation among carriers. We also decide that the adoption of a good faith negotiation standard would promote cooperation between providing incumbent LECs and qualifying carriers.

16. We conclude that, for any services and facilities otherwise available pursuant to section 251, carriers that do not intend to compete using those services and facilities may request those services and facilities pursuant to either section 251 or 259, and carriers that do intend to compete using those services and facilities must request them pursuant to section 251. We decide that, with respect to facilities and information that are within the scope of section 259 but beyond the scope of section 251, carriers that do not intend to compete using those facilities and information may pursue agreements with incumbent LECs pursuant to section 259. We conclude that a providing incumbent LEC is not required to share services or access used to compete against it, and that an incumbent LEC's right to deny or terminate sharing arrangements extends to the full breadth of section 259. We also conclude that a qualifying carrier may not make available any information, infrastructure, or facilities it obtained from a providing incumbent LEC

to any party that intends to use such information, infrastructure, or facilities to compete with the providing incumbent LEC. We emphasize that this will not otherwise affect the interconnection obligations of carriers pursuant to section 251. Moreover, competitive carriers, *i.e.*, regardless of whether they qualify for infrastructure sharing pursuant to section 259(d), that require the use of information or facilities to compete with the providing incumbent LEC may request the necessary facilities pursuant to sections 251 and 252. We also find that nothing in section 259 permits a providing incumbent LEC to refuse to enter into a section 259 agreement simply because the qualifying carrier is competing with the providing incumbent LEC, provided that the qualifying carrier is not using any shared infrastructure obtained from the providing incumbent LEC pursuant to a section 259 agreement to compete.

17. We decide that section 259 agreements must be filed with the appropriate state commission, or with the Commission if the state commission is unwilling to accept the filing; must be made available for public inspection; and must include the rates, terms, and conditions under which an incumbent LEC is making available all "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that are the subject of the negotiated agreement (section 259(b)(7)). We decide that this filing requirement refers only to agreements negotiated pursuant to section 259 and affirm that all previous interconnection agreements must be filed pursuant to section 252 as mandated by the Commission's *Local Competition First Report and Order*.[29]

18. We decide that section 259(c) requires notice to qualifying carriers of changes in the incumbent LECs' network that might affect qualifying carriers' ability to utilize the shared public switched network infrastructure, technology, information and telecommunications facilities and functions; that section 259(c) requires timely information disclosure by each providing incumbent LEC for each of its section 259-derived agreements; and that such notice and disclosure, provided pursuant to a section 259 agreement, are only for the benefit of the parties to a section 259-derived agreement. We also decide that section 259(c) does not include a requirement that providing incumbent LECs provide information on planned deployments of telecommunications and services prior to the make/buy point.

19. We decide that no incumbent LEC is excused, *per se*, from sharing its infrastructure because of the size of the requesting carrier, its geographic location, or its affiliation with a holding company. A carrier qualifying under section 259(d) therefore may be entitled to request and share certain infrastructure and, at the same time, be obligated to share the same or other infrastructure. We conclude that parties to section 259 negotiations can and will make the necessarily fact-based evaluations of their relative economies of scale and scope pertaining to the infrastructure that is requested to be shared. To facilitate such negotiations, we adopt a presumption that a telecommunication carrier falling within the definition of "rural

[29] *Local Competition First Report and Order* at ¶ 165-171. We note that section 252(a) requires all interconnection agreements, "including any interconnection agreements negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the appropriate state commission for approval. In contrast, we note that section 259 does not include a comparable provision.

telephone company" in section 3(37) lacks economies of scale or scope under section 259(d)(1), but we decide to exclude no class of carriers from attempting to demonstrate to a providing incumbent LEC that they qualify under section 259(d)(1). In negotiations with a requesting carrier or in response to a complaint arising from a refusal to enter into a section 259 agreement, a providing incumbent LEC may rebut the presumption that a "rural telephone company" lacks economies of scale or scope.

III. IMPLEMENTATION OF SECTION 259

A. General Issues

1. Background

20. As an initial matter, we stated in the NPRM our belief that we should adopt rules and guidelines that, in every case, promote the development of competition and the preservation and advancement of universal service.[30] We maintained that any significant variance between our implementation of section 259 and our implementation of other sections of the 1996 Act would undermine these two important and interrelated goals of promoting the development of competition and universal service. To this end, we tentatively concluded that the requirements of section 259 should be interpreted as complementary to the Commission's implementation of other sections of the 1996 Act.[31] We noted that section 259 is codified within a newly designated Part II of Title II of the 1934 Act, which part Congress designated "Development of Competitive Markets." We tentatively concluded that terms used in section 259 should be defined as they are defined in other Commission proceedings implementing the 1996 Act, except where section 259 clearly imposes a different definition.[32]

21. At the same time, we also tentatively concluded that the best way for the Commission to implement section 259, overall, would be to articulate general rules and guidelines.[33] We expressed our belief that section 259-derived arrangements should be largely the product of private negotiations among parties.[34]

2. Comments

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[30] NPRM at ¶ 6.

[31] *Id.*

[32] *Id.*

[33] NPRM at ¶ 7.

[34] *Id.*

22. Some commenters state that the Commission, overall, should interpret section 259 in a way that is complementary to the other sections of the 1996 Act.[35] There is a notable difference of opinion, however, about what should be considered a proper complementary approach. Basically, this controversy concerns the relationship between section 259 and sections 251 and 252.[36] Accordingly, we discuss these issues and related comments in Section III. B. 1., *infra*.

23. A majority of commenters agree with the tentative conclusion in the NPRM that the Commission should articulate general rules and guidelines to implement section 259.[37] Indeed, some commenters suggest that the Commission need only adopt the statutory language for its rules implementing section 259 because these, along with the analysis and directives set out in this Report and Order, will be enough to guide parties in their section 259 negotiations.[38] In the words of the Minnesota Coalition, "[n]egotiations should be the primary avenue for the development of section 259 infrastructure sharing arrangements."[39] Among the benefits of such a negotiation-driven approach to implementing section 259, NYNEX specifically identifies three: (1) it would accommodate evolving technologies and "unforeseen circumstances;" (2) it would promote negotiating flexibility so that parties can tailor agreements to meet individual needs; and (3) it would successfully reduce the need for government involvement.[40]

24. Moreover, according to the commenting LECs, the Commission need not be concerned about the effects on competition of a negotiation-driven, flexible approach to implementing section 259. PacTel offers its view that it is precisely where there is a foreseeable

[35] *See, e.g.*, ALLTEL Comments at 3; BellSouth Comments at 2; NCTA Comments at 2.

[36] *See, e.g.*, ALLTEL Comments at 3 (sections 251 and 259 are "distinct, yet complementary"); BellSouth Comments at 2 (section 259 "operates in complement with, but is distinct from" section 251); Frontier Comments at 1-2 ("The plain language of section 259 evidences that it serves a purpose far different from the unbundling, interconnection and resale requirements of section 251. The Commission should not -- contrary to the suggestion in the Notice -- attempt to harmonize the two sections." (citation omitted)). *But see* NCTA Comments at 2 ("The Commission's critical task in this proceeding is to implement section 259 in a manner that fully accords with the Act's central purpose of promoting competition in *all* telecommunications markets." (emphasis in original)).

[37] *See, e.g.*, Ameritech Comments at 3 ("strongly supports" tentative conclusion); BellSouth Comments at 2; GTE Reply Comments at 14; Castleberry Telephone Company, *et al.* comments at 3-4; NYNEX Comments at 2-3; Oregon PUC Comments at 2; PacTel Comments at 2; RTC Comments at 3; Southwestern Bell Comments at 1; Southwestern Bell Reply Comments at 2; Sprint Reply Comments at 2; USTA Comments at 15.

[38] *See* PacTel Comments at 7; GTE Reply Comments at 6-7; US West Comments at 8.

[39] Minnesota Coalition Comments at 8. *See also* Ameritech Comments at 3; BellSouth Comments at 2; BellSouth Reply Comments at 2; GTE Comments at 2; NYNEX Comments at 12; US West Comments at 3.

[40] NYNEX Reply Comments at 8-9.

lack of anticompetitive behavior that general guidelines are appropriate.[41] PacTel references the limitation in section 259(b)(6) and states that its prohibition against qualifying carriers competing with the providing incumbent LEC in the latter's service area means that concerns about anticompetitive behavior are "absent."[42] PacTel further offers the view that an approach that relies on general rules and guidelines is consistent with "the de-regulatory national policy framework of the 1996 Act."[43]

25. Non-LEC commenters like MCI and NCTA, however, oppose this LEC-advocated approach to implementing section 259 in favor of approaches that would tie the implementation of section 259 overtly to the Commission's regulations implementing section 251.[44] Although both MCI and NCTA contemplate section 259 arrangements that would be the result of negotiations by parties, both advocate imposing specific section 251-derived restrictions on the scope of such negotiations.[45] Thus, MCI would have us adopt rules to implement section 259 that impose section 251-derived concepts like price regulation based on forward-looking costs.[46] NCTA, on the other hand, would have us impose requirements on qualifying carriers to ensure, *inter alia*, that any competitive LEC obtains the benefit of infrastructure arrangements negotiated by the providing incumbent LEC and the qualifying LEC.[47]

3. Discussion

26. First, we affirm our tentative conclusion in the NPRM that terms used in section 259 should be defined as they are defined in other Commission proceedings implementing the 1996 Act, except, as indicated herein, where we determine that section 259 clearly imposes a different definition. We also, as reflected in what follows, affirm our tentative conclusion and adopt general rules and guidelines to define the obligations imposed by section 259. Further, we

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[41] PacTel Comments at 5.

[42] *Id. See also* GTE Comments at 2 ("LECs entering into infrastructure sharing arrangements are not competitors, so there is no need for rules to assure against discrimination and anticompetitive conduct. The fact that infrastructure sharing agreements are already in place throughout the country shows that detailed rules are unnecessary.").

[43] PacTel Comments at 2.

[44] *See, e.g.*, NCTA Comments at 6; NCTA Reply Comments at 3.

[45] *See, e.g.*, NCTA Reply Comments at 3 ("The [incumbent LECs'] accent on exclusivity and discriminatory pricing, as well as their call for the Commission to adopt only minimal guidelines under section 259, evince their intention to use section 259 to enable non-competing incumbent carriers in adjacent markets to enter into special infrastructure sharing agreements with one another under rates, terms and conditions that would be unavailable to competitive local exchange carriers (CLECs) in the incumbents' home markets." (citations omitted)).

[46] MCI Comments at 3-6. *See also* Discussion at Sections III. C., D., and E., *infra*.

[47] NCTA Comments at 3-7. *See also* Comments and Discussion at Section III. B. 1., *infra*.

adopt rules that restate the statutory language in most cases. Such an approach comports with a statutory scheme that, we conclude, depends in large part on negotiations among parties, negotiations that will vary depending upon the unique requirements of parties in each case. We believe that, at this time, all such negotiations should be constrained by very few explicit regulatory requirements. To this extent we agree with those commenters who have urged upon us just such a course of action.

27. We conclude, contrary to the arguments of some parties, that this approach also is the best way to satisfy our other stated general concern, namely, that rules implementing section 259 should not impede the development of competition in any market. We recognize that the primary goal of section 259 is to help ensure that certain carriers who agree to fulfill universal service obligations pursuant to section 214(e) continue to have access to "public switched network infrastructure, technology, information, and telecommunications facilities and functions."[48] But, as discussed below, there is no evidence in the language of section 259 or its legislative history that Congress intended to use section 259 to insulate any telephone service area from the advent of competition and no commenter in this proceeding makes such a claim. Some commenters advocate rules, however, which we also discuss in the following sections of this Report and Order, that we think might tend to promote such an outcome. Moreover, to the extent some LEC commenters argue that Congress intended no connection between section 259 and the other pro-competitive sections of the 1996 Act, we agree with NCTA that, to the extent that these commenters rely upon history for legislation that was considered but never enacted, prior to the 1996 Act, this legislative history is entitled to no weight in our deliberations.[49] Mindful of these concerns about the potential for insulating certain telephone service areas from competition, we believe that our approach adopted in this Report and Order is consistent with the Congressional policy goals, as set forth in Section 257, of promoting vigorous economic competition and eliminating market entry barriers for small businesses in the provision of telecommunications services and equipment.[50]

28. We conclude that the economic incentives and disincentives facing the incumbent LEC differ substantially in the circumstances contemplated in section 259, as implemented in this Report and Order, vis-a-vis the circumstances in which section 251 may apply. We have noted elsewhere that an incumbent LEC has little economic incentive to assist new entrants (i.e., competitors) in their efforts to secure a share of the incumbent LEC's local exchange market, and that the incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by, among other possible actions, insisting on supracompetitive prices or other unreasonable conditions of interconnection.[51] However, based on our interpretation of section

[48] *See* 47 U.S.C. §§ 259(d)(2); 259(a).

[49] *See* NCTA Reply Comments at 2 n.5.

[50] *See* 47 U.S.C. § 257.

[51] *Local Competition First Report and Order* at ¶¶ 10, 55.

259(b)(6), section 259 applies *only* in instances where the qualifying carrier does *not* seek to use shared infrastructure to offer certain services within the incumbent LEC's telephone exchange area.[52] Stated simply, the incumbent LEC will not lose market share in its telephone exchange area as a consequence of sharing infrastructure with a qualifying carrier under section 259.

29. An incumbent LEC that receives from a qualifying carrier a request to share infrastructure under section 259, as a result, does not face the incentives to charge excessive prices or to set other unreasonable conditions for the use of its infrastructure that arise in the competitive situation in which section 251 applies. At the same time, because we decide that an incumbent LEC may recover all the costs it incurs as a result of providing shared infrastructure pursuant to a section 259 agreement,[53] the incumbent LEC will not be discouraged from entering into such an agreement out of concern that it will be financially harmed by doing so. Moreover, we are less concerned, as we are in competitive situations, about the relative bargaining power of the parties negotiating section 259 sharing agreements. Unlike competitive situations, the unequal bargaining equality between qualifying carriers and incumbent LECs is less relevant since the incumbent LEC has less incentive to exploit any inequality to achieve a competitive advantage.

30. In sum, we conclude, consistent with the goals of the 1996 Act, that it is vitally important that we adopt rules in this proceeding that do not serve to discourage the development of competition in any local market. The approach we take here will, we believe, help to ensure an interpretation of section 259 that fully serves the intent of the section and is fully complementary to the other sections of the Act -- particularly given the placement of section 259 within a newly designated Part II of Title II of the 1934 Act, which part Congress designated "Development of Competitive Markets."

31. Certain commenters apparently fear that the Commission will implement section 259 by adopting the same regulatory approach employed in our implementation of section 251. These commenters suggest that the measures adopted in section 251 -- designed to remove barriers to competitive entry in all telecommunications markets -- would essentially subvert the statutory purpose of section 259 to assist certain telecommunications carriers to upgrade their network capabilities through particular, *i.e.*, cooperative, arrangements with other carriers.[54] We agree that section 251 and section 259 fulfill different statutory purposes. In contrast to sections 251-253, which focus on eliminating the legal, regulatory, economic, and operational barriers to competition in telecommunications markets, and on interconnection agreements between carriers that may compete against one another, section 259 addresses infrastructure sharing between an incumbent LEC and a qualifying carrier that will not use shared infrastructure to compete with the incumbent LEC. In this context of cooperation between non-competing carriers, we believe,

[52] *See* Discussion at Section III. C. 6., *infra*.

[53] *See* Discussion at Section III. C. 1., *infra*.

[54] *See, e.g.*, RTC Comments at 2. *See also* discussion *infra*, at ¶¶ 36-37, 50-52.

to the contrary, that our negotiation-driven structure -- as set out in this Report and Order -- fully effectuates the statutory purpose. Infrastructure sharing pursuant to section 259 is one means by which smaller LECs can implement evolving levels of advanced technology in order to continue to fulfill their universal service obligations. We have specifically considered the impact on small telecommunications companies of the regulatory regime we adopt here and we conclude that it imposes few burdens on such companies and none that are not explicitly required by the statute. We discuss in the following section other specific conclusions about the relationship between sections 259 and 251, and we set out in Sections C, D, and E, *infra,* other conclusions regarding these issues as they arise in interpreting the implementation criteria contained in sections 259(b), (c), and (d).

B. Requirements of Section 259(a)

32. Section 259(a) requires the Commission to "prescribe" by February 8, 1997:

> [R]egulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).[55]

1. Scope; Relationship Between Sections 259 and 251

a. Background

33. In the NPRM, we first sought comment on how we should interpret the scope of the section 259(a) requirement. We asked what is included in "public switched network infrastructure, technology, information, and telecommunications facilities and functions . . . ."[56] Specifically, we sought comment on what constitutes "public switched network infrastructure" for the purposes of section 259(a). Likewise, we sought comment on whether and how we should define the terms "technology, information, and telecommunications facilities and functions" to further the statutory goals of section 259(a). We asked what definitions for these terms would provide necessary or desirable flexibility as technology continues to evolve. We stated our belief that how these terms are defined has specific implications for the overall scope of section 259 and how section 259 relates to other sections of the 1996 Act, and we sought comment on

[55] 47 U.S.C. § 259(a).

[56] NPRM at ¶ 9.

whether other provisions in the statute, or its legislative history, could provide guidance on these issues.[57]

34. We further noted that there could be an overlap between those "telecommunications facilities and functions" that are the subject of section 259(a) and interconnection, unbundled network facilities, and resale made available pursuant to section 251(b) and (c).[58] We asked whether "telecommunication facilities and functions" provided under section 259(a) could include, for example, access to rights-of-way and resale made available under section 251(b), interconnection made available under section 251(c)(2), and unbundled network elements made available under section 251(c)(3).[59] We offered the view that, because "telecommunications facilities and functions" in section 259(a) is stated without terms of limitation, we might conclude that resale, interconnection, and unbundled network elements are included within the scope of section 259(a).[60]

35. We also noted statutory differences that distinguish who may obtain access to an incumbent LEC's network under section 251 and who may obtain infrastructure sharing under section 259. In this regard, we noted that section 251(c) requires incumbent LECs to provide interconnection and network element unbundling to all requesting telecommunications carriers, including carriers that plan to compete with the incumbents in the incumbents' service areas.[61] On the other hand, section 259(b)(6) provides that an incumbent LEC shall not be required to "engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area."[62] We sought comment on the implications of this distinction for our implementation of section 259.[63]

36. We also sought comment on the implications of such an approach for qualifying carriers that might want to obtain certain "telecommunications facilities and functions" as unbundled network elements pursuant to section 251(c)(3). We asked whether the limitation provided in section 259(b)(6) means that qualifying carriers must take, for example, resale, interconnection, and unbundled network elements exclusively pursuant to section 259 where the

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[57] *Id.*

[58] 47 U.S.C. § 251(b), (c). *See also Local Competition First Report and Order* at Sections IV., V., VIII.

[59] NPRM at ¶ 10.

[60] *Id.*

[61] 47 U.S.C. § 251(c)(2), (c)(3).

[62] 47 U.S.C. § 259(b)(6).

[63] NPRM at ¶¶ 10-11.

qualifying carriers do not propose to compete in the incumbent LEC's telephone exchange area.[64]

37. We pointed out that interpreting the scope of section 259(a) as relatively narrow appears to be supported by its requirement that only qualifying carriers, defined pursuant to section 259(d), may obtain section 259 arrangements from incumbent LECs.[65] Such a definition would appear to apply to many small LECs. We asked whether this observation supports a conclusion that Congress primarily, or exclusively, intended section 259 to benefit small carriers in an effort to advance the universal service goals of the 1996 Act. We asked further whether such a conclusion would support a Commission decision to construe the provisions of section 259 so as to apply only to cases involving small LECs or, even more restrictively, to arrangements between such qualifying carriers and their adjacent incumbent LECs.[66]

38. We also offered the view that it might be possible to interpret the scope of section 259 and its relationship to section 251 in a very different way. Neither section 251, on its face, nor the Commission's Orders in CC Docket No. 96-98 would appear to prohibit qualifying carriers, defined pursuant to section 259(d), from obtaining access to rights-of-way, resale facilities, interconnection, and unbundled network elements pursuant to section 251 (*i.e.*, outside the framework of section 259 with its apparent restrictions on competition). We asked whether the Commission could conclude that section 251 grants rights of access to rights-of-way, resale, interconnection, and access to unbundled network elements, on terms that also satisfy section 259 criteria, as types or examples of "telecommunications facilities and functions."[67] We sought comment about whether the Commission can and should find that qualifying carriers must take such resale, interconnection, and unbundled network facilities pursuant to section 251. On the other hand, we asked whether the Commission could give qualifying carriers the choice whether to obtain access pursuant to section 251 or section 259, or whether the Commission should apply section 259 only to elements of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that are *not* otherwise provided pursuant to section 251.[68]

39. We offered the view that, besides promoting infrastructure development on behalf of qualifying carriers, requiring qualifying carriers to take, for example, interconnection and unbundled network elements pursuant to section 251(c) -- instead of pursuant to section 259 -- also might tend to promote competition in local exchange markets. As discussed in Section III.

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[64] *Id.* at ¶ 11.

[65] As discussed in greater detail at Section III. E., *infra*, qualifying carriers are defined as carriers that lack economies of scale or scope and that request and obtain designation to receive universal service support pursuant to section 214(e).

[66] NPRM at ¶ 12.

[67] NPRM at ¶ 13.

[68] *Id.*

C. 6, *infra*, section 259(b)(6) does not require incumbent LECs to "engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area." No such limitation on the incumbent LEC's obligations appears in section 251, and, consequently, qualifying carriers are free, pursuant to section 251, to use interconnection and unbundled network elements whether or not they intended to compete in the providing incumbent LEC's telephone exchange area.[69] We sought comment on this approach to defining any overlap between sections 251 and 259 and on the consequences of such an approach for promoting the development of competition, particularly in rural markets.[70]

b. Comments

40. Incumbent LECs and others urge us to avoid attempting to define with specificity the scope of public switched network infrastructure, technology, information, and telecommunications facilities and functions as set out in section 259(a).[71] These commenters contend that Congress intended section 259 to narrowly focus on and benefit a certain class of carriers, namely, "qualifying" carriers defined pursuant to section 259(d), to the virtual exclusion of any concerns about the effects of infrastructure sharing on competition. To this end, some of them cite legislative history from earlier legislation -- never enacted -- that they think establishes such an intent.[72] According to these commenters, carriers which, pursuant to the specific requirements of section 259(d)(1) and (2), are found to lack economies of scale or scope and which agree to undertake specified universal service obligations will be aided by section 259 to obtain that infrastructure -- including advanced technology -- to enable them to continue to meet their universal service obligations.[73]

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[69] *See generally Local Competition First Report and Order* at Sections IV., V., IX.

[70] NPRM at ¶ 14.

[71] *See, e.g.*, BellSouth Comments at 9. *But see* AT&T Comments at 2 (arguing that defining proper scope of application of section 259 depends in part on properly defining "qualifying carrier" per section 259(d), and also on carefully tailoring definition of facilities and services subject to sharing).

[72] *See, e.g.*, GTE Comments at 8; Pacific Comments at 2-3; USTA Comments at 2, n.2; RTC Comments at 14. *But see* NCTA Reply Comments at 2 n.5 ("The weakness of the [incumbent LECs'] position is highlighted by their misplaced reliance on one predecessor bill, H.R. 3636, that was never enacted (sic) by the Senate, and on another bill, S. 2810, that was never even considered by either chamber . . . . These citations to bills that were never enacted are entitled to no weight." (citations omitted)).

[73] *See, e.g.*, ALLTEL Comments at 2-3; BellSouth Comments at 3; Frontier Comments at 1; Southwestern Bell Comments at 4. *See also* ALTS Comments at 2; GTE Reply Comments at 3.

41. Universal service promotion, not the promotion of competition, is the true purpose behind section 259, according to these commenters.[74] Accordingly, these parties argue that the Commission should avoid grafting pro-competition policy goals onto its implementation of section 259.[75] According to ALLTEL, "infrastructure sharing is far less about promoting competition in small and rural markets (which are generally less attractive to competitors) as it is about elevating the service offerings available in those markets beyond that which the qualifying carrier's economies of scale and scope or finances would otherwise permit."[76] ALLTEL further argues that sections 251 and 259 are "distinct, yet complementary."[77] ALLTEL argues that section 251 is designed to "govern the relationship among carriers in competitive situations," whereas section 259 is a cooperative provision to assist "communications 'have-nots.'"[78] Based on these asserted differences, ALLTEL argues that section 259 agreements should "sunset" when either the qualifying LEC's service territory becomes subject to competition, or where the qualifying LEC uses section 259 "facilities" to compete outside its service territory with the providing incumbent LEC.[79] RTC, which also argues that sections 251 and 259 are distinct, nevertheless takes issue with ALLTEL's analysis as imposing an unwarranted limitation on the availability of infrastructure sharing arrangements.[80]

42. LEC commenters by and large say that it is important for the Commission to ensure that qualifying carriers have the flexibility to define what infrastructure they can obtain pursuant to section 259 based on their individual requirements. Moreover, this flexibility is particularly important given that technology will continue to evolve. According to GTE,

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[74] ALLTEL Comments at 2; *see also* Sprint Reply Comments at 4 ("[section] 259 enhances the ability of smaller carriers to provide universal service -- period"); PacTel Reply Comments at 4 ("The Commission should not adopt any recommendation that would promote competition above universal service for section 259").

[75] *See, e.g.*, ALLTEL Comments at 2 (questioning Commission's belief that section 259 should be construed to promote dual goals of universal service and competition); NYNEX Reply Comments at 2 (noting that, while section 259 is consistent with pro-competitive goals of 1996 Act, it is not designed to open up local markets to competition).

[76] ALLTEL Comments at 2. *Accord* PacTel Comments at 2-5; *see also* Frontier Comments at 1-2 ("The plain language of section 259 evidences that it serves a purpose far different from the unbundling, interconnection and resale requirements of section 251. The Commission should not -- contrary to the suggestion in the Notice -- attempt to harmonize the two sections."); GTE Reply Comments at i ("[T]he Commission should acknowledge that infrastructure sharing under section 259 is independent of a carrier's obligation under sections 251 and 252."); USTA Comments at 7 ("the Commission should confirm the clear intent of the statute - that the provisions of section 259 stand on their own and have no relationship with section 251").

[77] ALLTEL Comments at 3.

[78] *Id.*

[79] *Id.* at 3-4.

[80] *See* RTC Reply Comments at 4 n.3 (arguing that ALLTEL's "sunset" proposal is a request for regulatory forbearance that fails to meet forbearance criteria set out in 47 U.S.C. § 10, and would establish an unwarranted "repeal" of section 259 which is "quite specific about what competition is incompatible with infrastructure sharing").

"[d]efining exactly what facilities are eligible to be shared will by necessity result in a static definition which would not adapt to rapidly changing technology."[81] Those LEC commenters which addressed the issue also oppose an adjacency requirement, *i.e.*, whereby infrastructure sharing could be obtained by qualifying carriers only from neighboring incumbent LECs.[82] The Minnesota Coalition contends that, although some services or functionalities otherwise obtainable by infrastructure sharing might be distance sensitive and, thus, legitimately exempt from provision pursuant to the "economically unreasonable" stricture of section 259(b)(1), other services such as advanced CLASS features and Signalling System 7 may be provided "over substantial distances."[83] Although some commenters note an apparent intent on the part of Congress to benefit "small, largely rural carriers," they largely oppose the adoption of size restrictions for carriers seeking to become "qualifying carriers."[84]

43. LEC commenters disagree about how we should construe "public switched network infrastructure, technology, information, and telecommunications facilities and functions." Thus, for example, USTA takes issue with the Commission's proposal in the NPRM to read this phrase in a way that, according to USTA, would result in various types of technology, information, and telecommunications facilities and functions being improperly included in the scope of section 259(a). Instead of the proposed reading that would find that "public switched network" modifies only "infrastructure," USTA argues that the entire phrase should be read as modified by "public switched network."[85] This results, according to USTA, in an interpretation of the infrastructure, technology, information, and telecommunications facilities and functions available under section 259 that is limited to that which is network-related.[86] One result of this interpretation, according

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[81] GTE Reply Comments at 2. *See also* Castleberry Telephone Company *et al.* Comments at 3 (terms in section 259(a) should be defined as defined in other proceedings, including section 251 *Local Competition First Report and Order*; terms in section 259 not so defined should be defined using "broadest possible language" recognizing continual evolution of technology and services).

[82] Minnesota Coalition Comments at 11; RTC Comments at 6.

[83] Minnesota Coalition Comments at 11.

[84] *See, e.g.*, RTC Comments at 5. *Contra*, NCTA Reply Comments at 9 (arguing for restricting qualifying carriers to small, rural carriers; opposing application of qualifying carrier status to large carriers, *inter alia* as violating section 259(d)(1) restrictions; and concluding that "[a]ny definition of 'qualifying carrier' that includes carriers that are affiliated with large telephone companies or carriers that serve a majority of access lines in a particular state would contravene the Act and undermine competition."). *And see* Minnesota Coalition Comments at 11 ("Qualifying carriers should be determined by their economic power, which is demonstrated in size.").

[85] USTA Comments at 5. *Accord* GTE Comments at 3. *See also* BellSouth Comments at 9-10.

[86] USTA Comments at 5. *See also* Sprint Comments at 3 ("['Public switched network infrastructure, technology, information, and telecommunications facilities and functions'] includes those facilities necessary to provide voice and data communications and signalling capability, including access to industry standard databases and connections to other networks. Those are the advanced telecommunications infrastructure facilities that would ensure that the qualifying carrier can offer advanced telecommunications services . . . .").

to USTA, is that services resale, intellectual property owned by third parties, and non-public information like marketing information would be clearly unavailable to qualifying carriers pursuant to section 259 agreements.[87] Similarly, some larger LEC commenters advocate the elimination of resale and services from the scope of section 259.[88] Frontier would have us limit the scope of section 259(a) to advanced services and functionalities like advanced signalling systems because, according to Frontier, even carriers which lack economies of scale or scope must "have the resources to deploy a network and, in the case of an incumbent rural telephone company, already has."[89]

44. RTC disagrees that such limitations should be read into section 259(a).[90] RTC argues that qualifying carriers should be able to obtain whatever they need "to modernize their networks and broaden the services they provide to their customers."[91] According to RTC, this would allow qualifying carriers to obtain those facilities and functions otherwise available pursuant to section 251 -- including services resale, interconnection, and unbundled network elements -- "so long as such facilities and functions are a part of the public switched network."[92] Rejecting assertions from PacTel, BellSouth, and GTE and others that services should be excluded as not belonging to infrastructure, technology, information, or telecommunications facilities and functions, RTC says that such distinctions "rely too heavily on semantics."[93] This is so, according to RTC, because the same arrangement often can be classified as a service, as a network element, or as a "joint provision vehicle."[94] According to RTC, this entire classification scheme should be rejected because it derives from common carrier regulation, and common carrier treatment of section 259-provided arrangements is specifically prohibited per the

[87] USTA Comments at 4-5.

[88] *See, e.g.*, GTE Comments at 4 ("Section 259 requires only the sharing of infrastructure, not services. When Congress intended to include services, it did so specifically . . . ."); Southwestern Bell Comments at 5. *See also* Sprint Reply Comments at 3 ("[S]ection 259 establishes requirements for the sharing of infrastructure, not the provision of service."). *But see* RTC Reply Comments at 7-8.

[89] Frontier Comments at 4 n.9.

[90] RTC Comments at 3.

[91] *Id.*

[92] *Id.* at 3-4. *See also* Minnesota Coalition Comments at 4-6.

[93] RTC Reply Comments at 7.

[94] *Id.* at 7-8.

mandate of section 259(b)(3).[95] RTC also disagrees with Frontier that section 259 should be viewed as providing only advanced services and functionalities.[96]

45. The LECs and their representatives disagree about another issue as well. Some LEC commenters welcome the suggestion in the NPRM that the Commission could allow non-competing, qualifying carriers to choose between obtaining what they need pursuant to either section 259 infrastructure arrangements or pursuant to section 251 interconnection agreements.[97] Other LECs, like Ameritech, argue that the Commission "should make clear that non-competing carriers are compelled to obtain shared infrastructure under section 259."[98]

46. ALTS, NCTA, and MCI, in different ways, oppose the general view offered by the LECs and their representatives that the Commission should construe section 259 as focused solely on the promotion of universal service goals without regard to any effects on competition.[99] All three argue that the Commission ought to recognize a close connection between the pro-competition policy goals of, *e.g.*, section 251, and the infrastructure sharing goals of section 259.[100] ALTS generally argues that qualifying carriers ought to be able to obtain "infrastructure, technology, information, and telecommunications facilities and functions" pursuant to section 259.[101] But, reflecting its concerns about LEC assertions about the scope of section 259(b)(6),[102]

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[95] *Id.* at 4. *See also* MCI Reply Comments at 4-5 (arguing that Commission should broadly interpret scope of section 259(a) to include services, including information services, subject only to requirement that providing incumbent LEC need not provide such services if this necessitates also transferring its service customers).

[96] RTC Reply Comments at 7 n.7.

[97] PacTel Comments at 10; RTC Comments at 4; Southwestern Bell Comments at 4. *See also* MCI Reply Comments at 3.

[98] Ameritech Comments at 4 (arguing that benefits to competition "would be minimal" as result of allowing non-competing qualifying carriers to choose freely between sections 251 and 259). *See also* Frontier Comments at 4-5 ("[The] Act provides qualifying carriers with a choice. They may obtain advanced network services pursuant to infrastructure-sharing agreements *for use in serving their own customers.* Alternatively, they may obtain unbundled elements and interconnection for any purpose permitted by the Act. What the Act precludes is a qualifying carrier from obtaining both." (emphasis in original)).

[99] *See generally* ALTS Reply Comments at 1; NCTA Reply Comments at 1-4; MCI Reply Comments at 1-5. *But see* Sprint Reply Comments at 1-3 (supporting LEC interpretation of intent and scope of section 259 and rejecting specific arguments of ALTS).

[100] *See, e.g.*, NCTA Comments at 3 ("The Commission's administration of section 259 should in no way undermine implementation of the core local competition requirements of section 251. Section 259 should not operate to provide rural telcos with special advantages over rural cable companies entering the telephony market with regard to access to advanced network capabilities.").

[101] ALTS Comments at 1.

ALTS argues that anything thereby received should also serve, in the ordinary course, as "prima facie evidence that such services can and should be made available by the incumbent for any purposes pursuant to section 251, except in those few hypothetical situations where the matters provisioned pursuant to section 259 might extend beyond those provided under section 251."[103] Thus, according to ALTS, qualifying carriers should be "permitted to use Section 259 services and facilities for any purpose, provided only that when such services are utilized outside the qualifying carrier's universal service territory, the provisioning incumbent must be compensated for such use pursuant to the pricing standards of Section 251."[104]

47. NCTA urges us generally to understand that "[the] Commission's critical task in this proceeding is to implement Section 259 in a manner that fully accords with the Act's central purpose of promoting competition in *all* telecommunications markets."[105] NCTA proposes, in line with its perspective, that the Commission construe the scope of section 259 as relatively narrow[106] so that the scope of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" used in section 259 "is no broader than the scope of features, functions, services and information available to CLECs [competitive local exchange carriers] under Section 251."[107] Alternatively, NCTA would have us require qualifying carriers seeking infrastructure sharing under section 259 to demonstrate that the requested capability cannot be obtained from the incumbent LEC pursuant to section 251.[108] Further, to ensure that qualifying carriers are not able to impede the development of competition in their service areas, NCTA urges us to find that qualifying carriers are obliged to provide section 259-obtained network capabilities to competitive LECs. "Absent such a requirement," according to NCTA, "a qualifying carrier would have an incentive to obtain network capabilities from an adjacent [incumbent LEC] under Section 259, rather than deploy its own features and functions that would be subject to unbundling under Section 251."[109] Further, NCTA would have us impose this

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[102] *See* Section III. C. 6, *infra* (addressing issues relating to limitations on use of infrastructure obtained pursuant to section 259 in section 259(b)(6)).

[103] ALTS Comments at 3. *But cf.*, Frontier Comments at 4-6 (arguing that, because advanced infrastructure "services and facilities" will *not* include unbundled elements, resale, and interconnection included per pro-competition requirements of section 251, Commission "should not require incumbent local exchange carriers to make the terms and conditions of these agreements generally available").

[104] ALTS Comments at 1.

[105] NCTA Comments at 2 (emphasis in original).

[106] NCTA Comments at 2-3 (scope of Section 259 narrowed by Section 259(d) criteria imposed on qualifying LECs).

[107] NCTA Comments at 4 n. 13.

[108] *Id.* at 6.

[109] *Id.* at 4-8.

requirement even on qualifying carriers which have obtained exemption from section 251 responsibilities pursuant to section 251(f), because, according to NCTA, such exemption can only be predicated "upon the economic unreasonableness or technical infeasibility of meeting a particular Section 251(c) obligation," neither of which finding could obtain if the qualifying LEC successfully obtained a capability pursuant to Section 259.[110] If, in any event, the qualifying carrier nevertheless cannot provide section 259-obtained network capabilities to competitive LECs for technical or economic reasons, NCTA would have us require the providing incumbent LEC to make available the requested capabilities directly to the requesting competitive LEC.[111]

48. MCI agrees with NCTA's proposals regarding qualifying carrier obligations,[112] and also argues, more generally, that the Commission should find that there is a close relationship between sections 251 and 259. MCI, indeed, would have us read sections 251 and 259 as essentially overlapping.[113] Basically, this appears to mean, in MCI's view, that the Commission should recognize that section 259 is intended to provide qualifying carriers with a parallel opportunity -- as provided pursuant to statutory restrictions unique to section 259 -- to obtain, *inter alia*, those facilities and functions that are otherwise made available to interconnecting carriers pursuant to the Commission's implementation of section 251 in the *Local Competition First Report and Order*.[114] But, according to MCI, Congress would not have intended to provide such a parallel provision unless non-competing qualifying carriers could receive an added benefit for negotiating pursuant to section 259, namely, the ability to negotiate better terms than they would receive pursuant to section 251.[115] To this end, MCI urges us, generally, to make rules we adopted in the *Local Competition First Report and Order* regarding access to incumbent LEC facilities and services available as "baseline terms" to any section 259 qualifying carrier.[116]

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[110] *Id.* at 5 (citing 47 U.S.C. § 251(f)).

[111] *Id.* at 5-6.

[112] MCI Reply Comments at 3-4.

[113] MCI Comments at 2-3.

[114] MCI Comments at i, 3-6 ("Congress intended the Commission to implement rules permitting carriers qualifying under Section 259 to receive access to [incumbent LEC] network facilities, resources, and information on terms more favorable than they would receive, either under Section 251, or under any agreement among non-competing LECs prior to passage of the 1996 Act. Section 259 can realize Congress' desire of promoting universal service only if the qualifying LEC has the ability to gain access to incumbent LEC facilities, over-and-above its ability to do so under Section 251.").

[115] MCI Reply Comments at 3 ("Since any carrier may automatically obtain terms and conditions equal to any existing 252 agreement, there is no reason for it to enter into negotiations under Section 259 unless it is able to receive more favorable terms and conditions. The Commission should implement its Section 259 rules so as to ensure this outcome.").

[116] MCI Comments at 3-5 (specifically recommending that Commission make "available" 47 C.F.R. §§ 51.305-323; 51.405; 51.501-515; 51.601-617; and 51.701-717 to any Section 259 qualifying carrier).